SUPPRESSING CONFESSIONS: INVOLUNTARINESS AND MIRANDA

By Paul Couenhoven

I. A CONFESSION IS INADMISSIBLE AS INVOLUNTARY IF IT IS EXTRACTED BY COERCIVE MEANS

GENERAL LAW

The due process clause of the Fourteenth Amendment to the United States Constitution and Article I, sections 7 and 15 of the California Constitution bar the use of involuntary confessions against a criminal defendant.(*Jackson v. Denno* (1964) 378 U.S.368, 385-386, *People v. Benson* (1990) 52 Cal.3d 754, 778.) The California Constitution previously required more stringent safeguards. For example, the prosecution had the burden of proving a statement was voluntary beyond a reasonable doubt. (*People v. Memro* (1995) 11 Cal.4th 786, 826.) However, since the passage of Proposition 8, the California Constitution offers no more protection than the federal one. (*People v. Boyette* (2002) 29 Cal.4th 381, 411.)

A confession is involuntary if it is not "the product of a rational intellect and a free will." (*Mincey v. Arizona* (1978) 437 U.S. 385, 398; see also *Lynumn v. Illinois* (1963) 372 U.S. 528, 534 [test is whether defendant's "will was overborne at the time he confessed"].) The question is whether the police used force or psychological ploys which are so coercive that the tend to produce a statement that is involuntary, and therefore unreliable. (*People v. Ray* (1996) 13 Cal.4th 313, 340.) Coercive police conduct is a necessary predicate to a finding of involuntariness. (*Colorado v. Connelly* (1986) 479 U.S. 157, 167.) The test is, therefore, primarily objective. Subjective factors will be considered in determining whether a suspect's will was overborne, but only if police coercion is present.

Whether a statement is involuntary depends upon the totality of the circumstances surrounding the interrogation. (*People v. Neal* (2003) 31 Cal.4th 63, 79.) The People "must prove by a preponderance of the evidence that the statement was voluntary." (*People v. Vasila* (1995) 38 Cal.App.4th 865, 873.) If a confession is involuntary, is must be totally

suppressed. It is inadmissible under any circumstances, even if the defendant testifies. (*People v. Neal*, *supra*, 31 Cal.4th at p. 78.)

In most cases today, the interview is tape-recorded and often videotaped. The facts surrounding the interrogation are therefore undisputed. The standard on appeal is therefore independent review. "The ultimate issue of 'voluntariness' is a legal question requiring independent . . . determination." (*Arizona v. Fulminante* (1991) 499 U.S. 279, 287.) If for some reason there is no tape recording, all factual findings, whether express or implied, must be accepted on appeal if supported by substantial evidence. (*People v. Jablonski* (2006) 37 Cal.4th 774, 813-814.) This means if there is a conflict between a police officer's and a defendant's version of what occurred, the court will adopt the police officer's version.

VOLUNTARINESS: RELEVANT FACTORS

An involuntary confession is one "extracted by any sort of threats or violence, [or] obtained by any direct or implied promises, however slight, [or] by the exertion of any improper influence." (*Hutto v. Ross* (1976) 429 U.S. 28, 30, quotation marks and citations omitted.)

Relevant factors include "the crucial element of police coercion, [citation]; the length of the interrogation [citation]; its location [citation]; its continuity" as well as "the defendant's maturity [citation]; education [citation]; physical condition [citation]; and mental health." (*Withrow v. Williams* (1993) 507 U.S. 680693-694

A. FORCE was frequently a factor in cases during the first half of the 19th Century. It is rarely a factor today. Examples include:

> **Confession extracted at gunpoint: confess or die**. *Beecher v. Alabama* (1967) 389 U.S. 35, 36. Tennessee police officers captured Beecher, an escaped convict suspected of rape and murder, after shooting him in the leg. The local Chief of Police pressed a loaded gun to his face while another officer pointed a rifle against the side of his head. The Police Chief asked him whether he had raped and killed a

white woman. When he said that he had not, the Chief called him a liar and said, “If you don't tell the truth I am going to kill you." The other officer then fired his rifle next to the petitioner's ear, and the petitioner immediately confessed.

Confession extracted by whipping: confess or be maimed. *Brown v. Mississippi* (1936) 297 U.S. 278. Police went to question defendant about a murder. When he denied any involvement, they seized him and hanged him by a tree limb. They let him down and hung him up again. When he still protested his innocence, he was tied to the tree and whipped. He maintained his innocence and was finally released. “He returned with some difficulty to his home, suffering intense pain and agony.” The police returned after a couple days, took the defendant and severely whipped him again. “the defendant then agreed to confess to such a statement as the deputy would dictate.” At trial, the rope marks were still visible on his neck.

Threatening with mob violence: confess or be lynched. *Payne v. Arkansas* (1958) 356 U.S. 560: A young black man confessed after being told by the Chief of Police that “there would be 30 or 40 people there in a few minutes that wanted to get him" and that, if he would tell the truth, the Chief of Police probably would keep them from coming in.”

Today, the “use of overt physical violence has largely given way to the employment of more subtle kinds of pressure.” (O. Stephens, *The Supreme Court and Confessions of Guilt* 5-6 (1973). However, there are modern examples of threats of violence. In *Arizona v. Fulminante* (1991) 499 U.S. 279 the defendant, a suspected child killer, was in prison. A cell mate was acting as a police agent. He noted Fulminante was having a hard time in the yard, and being threatened by other prisoners. The cell mate said he would protect him from prison violence if he “told the truth,” i.e., confessed.

B. EXTENDED INTERROGATION Lengthy and uninterrupted interrogation is a factor which can be used to argue a confession is involuntary.

Chambers v. Florida (1940) 309 U.S. 227: After an elderly White man was

robbed and murdered, police arrested 25 to 40 Negroes and confined them without charges, taking turns questioning them. For five days, defendants were subjected to interrogations culminating in an all night examination without formal charges being brought and without the ability to see family, a friend, or an attorney.

Ward v. Texas (1942) 316 U.S. 547 A confession was signed by defendant only after he had been arrested without a warrant, taken from his home town, driven for three days to several different counties, and questioned continuously for those three days. According to the county attorney of Titus county, who questioned petitioner in three different jails on three different days, petitioner twice stated, that he would be glad to make any statement that "I wanted him to make but that he didn't do it."'

Leyra v. Denno (1954) 347 U.S. 556 Confession to murder obtained after defendant was subjected to many hours of day-and-night questioning by police officers.

Harris v. South Carolina (1949) 338 U.S. 68. Confession obtained after defendant was questioned for extended periods of time over several days.

Turner v. Pennsylvania (1949) 338 U.S. 62. Defendant held for five days without arraignment, without the aid of counsel or friends and without being advised of his constitutional rights. Meanwhile, he was interrogated by relays of police officers, sometimes during both the day and the night, until he confessed to murder.

Interrogation going on for days is not a common feature today. However, shorter periods of interrogation, in combination with other factors, can result to a finding of involuntariness. For example, in *People v. Esqueda* (1993) 17 Cal.App.4th 1450, 1485 the court held a confession was involuntary where, among other factors, police questioned an emotionally distraught and exhausted defendant for eight hours. The police "unremittingly pressured their prey until he finally yielded."

C. HELD INCOMMUNICADO, refused contact with family or friends or

counsel. This factor is frequently noted in combination with a lengthy period of interrogation.

Harris v. South Carolina (1949) 338 U.S. 68, 70. During the whole period of interrogation over course of several days he was denied the benefit of consultation with family and friends

Turner v. Pennsylvania (1949) 338 U.S. 62. Suspect questioned for five days without arraignment, without the aid of counsel or friends and without being advised of his constitutional rights.

People v. Neal (2003) 31 Cal.4th 63, 84. Suspect confined incommunicado for more than 24 hours. Refused to honor request to talk to a lawyer, and would not allow contact with mother or brother. Officer said, "you can talk to me, and no one else."

D. DEPRIVATION of food, water and clothing

Brooks v. Florida (1967) 389 U.S. 413. Left naked in a small cell with a hole in one corner into which he and his cell mates could defecate, for two weeks during which he subsisted on a daily fare of 12 ounces of thin soup and 8 ounces of water. The Supreme Court found "a shocking display of barbarism" (*Id*. at p. 415.)

People v. Neal (2003) 31 Cal.4th 63, 84. Placed in cell without toilet or sink. Not taken to bathroom or given water until the next morning. Not offered any food until after he gave a second confession.

E. INTIMIDATION

Harris v. South Carolina (1949) 338 U.S. 68, 70. Surrounded by as many as a dozen police officers during questioning.

F. THREATS AND PROMISES are the most common factors in recent case law.

If a statement is obtained "by any sort of threats . . . [or] obtained by any direct or

implied promises, however slight," the statement is involuntary. (*People v. Neal* (2003) 31 Cal.4th 63, 79.)

THREATS OR PROMISES INVOLVING FAMILY MEMBERS are particularly compelling.

People v. Steger (1976) 16 Cal.3d 539, 550. "A threat by police to arrest or punish a close relative, or a promise to free the relative in exchange for a confession, may render an admission invalid."

United States v. Tingle (9th Cir. 1981) 658 F.2d 1332. Police told burglary suspect she was facing prison, and might not see her young child for "a while" if she did not confess. Statement found involuntary. "The relationship between parent and child embodies a primordial and fundamental value of our society." (*Id*. at p. 1336.)

Lynumn v. Illinois (1963) 372 U.S. 528. Confession made by defendant only after the police had told her that state financial aid of her infant children would be cut off, and her children taken from her, if she did not "cooperate."

Harris v. South Carolina (1949) 338 U.S. 68. Threatened to arrest defendant's mother for handling stolen property if he did not confess.

People v. Trout (1960) 54 Cal.2d 576. Police told the defendant that if he confessed his wife would be released to care for their children.

PROMISES OF LENIENCY

"[A] confession elicited by promises of benefit or leniency is inadmissible." (People v. Carr (1972) 8 Cal.3d 287, 296.) "However, mere advice or exhortation by the police that it would be better for the accused to tell the truth when unaccompanied by either a threat or a promise does not render a subsequent confession involuntary." (*People v. Sultana* (1988) 204 Cal.App.3d 511, 522; see also *Ceja v. Stewart* (9th Cir. 1996) 97 F.3d 1246 [urging defendant to tell the truth did not make confession involuntary].) And merely being sympathetic and friendly is not coercive.(See *United States v. Posada-Rios* (5th Cir. 1998)

158 F.3d 832 ["fact that deputy exhibited sympathy and created an atmosphere of trust" does not render confession involuntary].)

Leyra v. Denno (1954) 347 U.S. 556, 559-560 A hypnosis trained psychiatrist repeatedly told defendant how much he wanted to and could help him, and how bad it would be for petitioner if he did not confess, and how much better he would feel, and how much lighter and easier it would be on him if he would just unbosom himself to the doctor.

People v. Neal (2003) 31 Cal.4th 63, 81 Officer tells defendant he is the bus driver, and he will decide whether to let defendant off near home, or in Timbuktu."If you cooperate," I can do the best I can. But if you don't, "the system is going to stick it to you as hard as they can."

People v. Hogan (1982) 31 Cal.3d 815, 835. "If there was a mental problem involved in this situation that I would like to know what it was and we would see what we could do to help him."

People v. Brommel (1961) 56 Cal.2d 629 the police told the suspect that unless he admitted beating his daughter, the police would write the word "liar" on their report to the judge. The Court held this conduct constituted both a threat and an implied promise of leniency which rendered the subsequent confession inadmissible.

People v. McClary (1977) 20 Cal.3d 218, 229. Police repeatedly called defendant a liar. They told her that unless she admitted the true extent of her involvement in a murder, she would be charged as a principal to murder and would face the death penalty. In doing so, "the officers strongly implied that if defendant changed her story and admitted mere 'knowledge' of the murder, she might be charged only as an accessory after the fact." (*Id.* at p. 229.)

People v. Esqueda (1993) 17 Cal.App.4th 1450, 1486. Police suggested it would be better for defendant if he killed the victim accidentally. They said they knew it was him and that it was only a matter of intentional or accidental killing. They told him his only way out was to say it was an accident. They implied by so

saying he would not have to go to prison and would be out with his children.

G. LIES are generally acceptable. Police can lie about the case, and about the evidence that they have, with impunity. However, deception may be considered by the court when there are other factors supporting finding of involuntariness. (*People v. Musselwhite* (1988) 17 Cal.4th 1216, 1240.) "While the use of deception or communication of false information to a suspect does not alone render a resulting statement involuntary [citation], such deception is a factor which weighs against a finding of voluntariness." (*People v. Hogan* (1982) 31 Cal.3d 815, 840-841 [police had falsely told defendant two girls saw him commit murder].)

People v. Esqueda (1993) 17 Cal.App.4th 1450, 1485. Ana was murdered, and defendant was the suspect. "He was continually lied to about Ana's condition for over an hour. Thereafter, he was lied to about Ana making dying declarations accusing him of the crime, about Ana's head being burned by gunfire, about finding fingerprints on Ana's neck, about his fingerprints being found on the bullet that killed Ana, about a witness by a dumpster saying Esqueda was the only person to go into the apartment that night, about being investigated for the murder of another person he had known on the streets, and about the gunshot residue evidence showing he shot Ana."

H. A DELIBERATE VIOLATION OF *MIRANDA* is a relevant factor

People v. Neal (2003) 31 Cal.4th 63, 81 Police continued to question defendant even after he invoked his right to counsel "probably" 7 to 10 times. The officer conceded he knew this was wrong, but wanted to obtain a confession he could use to impeach defendant if he testified at trial. The court found this was a "blatant disregard of *Miranda*." Police "purposefully disobeyed *Miranda*'s injunction." (*Id*. at p. 82.)

People v. Esqueda (1993) 17 Cal.App.4th 1450, 1486. Police continued to

question defendant even though "[s]everal times Esqueda expressed his desire not to talk by saying that 'it'll be better if I don't talk, man' and later said, 'I'm just not gonna say nothing.'"

I. IF THERE IS POLICE COERCION, COURTS WILL CONSIDER INDIVIDUAL CHARACTERISTICS OF THE DEFENDANT.

If there is police coercion, all circumstances are relevant, including "evaluation of [defendant's] age, experience, education, background, and intelligence ... ." (*Fare v. Michael C.* (1979) 442 U.S. 707, 725.

Payne v. Arkansas (1958) 356 U.S. 560, 567, court considered defendant's lack of education in determining whether his will was overborne.

Arizona v. Fulminante (1991) 499 U.S. 279, 286 fn. 2. after finding improper implied threat, and promise of protection from prison violence, court considered defendant's lack of education and frail physical stature ("short in stature and slight in build")

Reck v. Pate (1961) 367 U.S. 433, 441 Court considered suspect's low intelligence.

Harris v. South Carolina (1949) 338 U.S. 68, 70. "It is relevant to note that Harris was an illiterate."

Gallegos v. Nebraska (1951) 342 U.S. 55: 14-year-old defendant.

People v. Neal (2003) 31 Cal.4th 63: 18 year old defendant with minimal education and low intelligence.

Youth can be particularly significant when combined with other factors. (See, e.g., *Murray v. Earle* (5th Cir. 2005) 405 F.3d 278 [11 year old defendant, in custody for three days, unaccompanied by parent, guardian or attorney, and having below-normal intelligence]; *A.M. v. Butler* (7th Cir. 2004) 360 F.3d 787 [confession involuntary where 11-year-old defendant questioned for two hours with no parent or lawyer, with detective

constantly challenging his statement and accusing him of lying].)

J. HELPFUL IF THERE IS EVIDENCE SUGGESTING THE CONFESSION MIGHT BE FALSE

In *People v. Hogan* (1982) 31 Cal.3d 815 police surreptitiously taped a conversation between suspect and his wife after he had falsely been told two girls saw him murder someone. He told his wife he thought he might be going crazy, because he could not remember committing the crime. The court did not expressly say the confession might have been false, but it is suggested by some of its analysis. "The surreptitiously taped conversation with appellant's wife shortly before the incriminating statement was made demonstrates that the false information regarding eyewitnesses had caused appellant to doubt his own sanity, and thus made more plausible the police offer of help for any mental problem appellant might have." (*Id*. at p. 841.)

CALIFORNIA EXAMPLES OF WINNING CASES. THE MORE FAVORABLE FACTORS YOU CAN ENUMERATE THE BETTER

People v. Neal (2003) 31 Cal.4th 63, 81-85 investigators made threats and promises and deliberately violated the *Miranda* rights of an immature and uneducated defendant who was held incommunicado and without food for more than 24 hours.

People v. Hogan (1982) 31 Cal.3d 815, 838-843. Interrogators made promises of leniency, said they would ensure he got help with any mental problems, engaged in psychological coercion and falsely told the defendant he had been seen committing the charged offenses.

People v. Jimenez (1978) 21 Cal.3d 595, 607. Investigator told the defendant he could get the death penalty if he did not admit the offense but a young codefendant, the actual killer, probably would not get the death penalty because he was only 18. Police "told him that if he talked about the case, [they] would tell the jury and the jury would go lighter on him."

In re Shawn D. (1993) 20 Cal.App.4th 200, 213-216 [Sixth District, Marylou Hillberg] the interrogating officer repeatedly told the suspect, falsely, that witnesses would identify him, that a truthful statement would benefit the suspect's girlfriend and that the suspect would not be tried as an adult if he confessed.

People v. Esqueda (1993) 17 Cal.App.4th 1450, 1486 "The police detectives used lies, accusations, exhaustion, isolation and threats to overcome Esqueda's resistance. Detective Hill screamed at him for his involvement of the children in this affair. As we have pointed out, the other officers appealed to his manhood, his religion, and his Hispanic heritage, and, when all else failed, clearly advised him his refusal to talk would be interpreted as evidence of premeditation and support a charge of first degree murder. They repeatedly told Esqueda that if he admitted the shooting was an accident, he would be better off, and clearly suggested to him he would avoid the more serious charge by that admission. The message was very clear. Failure to tell them what they wanted to hear would result in greater charges."

People v. Brommel (1961) 56 Cal.2d 629. police told the suspect that unless he changed his story (he had denied beating his daughter) the police would write the word "liar" on their report to the judge. According to the court, this conduct constituted both a threat and an implied promise of leniency which rendered the subsequent confession inadmissible.

People v. McClary (1977) 20 Cal.3d 218. The police repeatedly branded defendant a liar, told her that unless she altered her statement and admitted the true extent of her involvement, she would be charged as a principal to murder and would face the death penalty. In doing so, according to the court, "the officers strongly implied that if defendant changed her story and admitted mere 'knowledge' of the murder, she might be charged only as an accessory after the fact." (*Id.* at p. 229.)

PREJUDICE

Since an involuntary confession violates constitutional protections, The *Chapman* (*Chapman v. California* (1967) 386 U.S. 18, 24, harmless error standard applies to evaluate the

prejudice when a statement is erroneously introduced at trial. A confession is such compelling evidence, prejudice is easier to find than in most other circumstances.

> A confession is like no other evidence. Indeed, "the defendant's own confession is probably the most probative and damaging evidence that can be admitted against him. . . . The admissions of a defendant come from the actor himself, the most knowledgeable and unimpeachable source of information about his past conduct. Certainly, confessions have profound impact on the jury, so much so that we may justifiably doubt its ability to put them out of mind even if told to do so." (*Arizona v. Fulminante*, *supra*, 499 U.S. at p. 296.)

II. A CONFESSION OBTAINED FROM A DEFENDANT IN CUSTODY IS SUBJECT TO SUPPRESSION UNDER THE FIFTH AMENDMENT IF THE DEFENDANT WAS NOT ADEQUATELY ADVISED OF HIS RIGHTS UNDER *MIRANDA V. ARIZONA*

GENERAL PRINCIPLES

In *Miranda v. Arizona* (1966) 384 U.S. 436, the Supreme Court held that in order to protect a defendant's constitutional right against self-incrimination guaranteed by the Fifth Amendment, the police must inform a defendant who is in custody of certain rights. If police fail to do so, the confession obtained will be excluded from the prosecutor's case in chief.

The *Miranda* rights are well known. Police must tell a person in custody he or she has the right to remain silent, that anything said will be used against her or him in court, that the person has the right to consult with a lawyer and have a lawyer present during questioning, and that if the person cannot afford a lawyer one will be appointed to represent her or him.

"If the individual indicates in any manner, at any time prior to or during questioning, that he [or she] wishes to remain silent, the interrogation must cease." (*Id*. at p. 474.)

"A heavy burden rests on the Government to demonstrate that the defendant

knowingly and intelligently waived his privilege against self-incrimination and his right to retained or appointed counsel." (*Id*. at p. 475.)

The standard of review on appeal is the same as for questions of voluntariness. All express and implied factual findings which support the trial court's ruling are upheld if supported by substantial evidence. (*People v. Box* (2000) 23 Cal.4th 1153, 1194.) The application of *Miranda*'s legal principle to those facts is subject to independent review. (*People v. Waidla* (2000) 22 Cal.4th 690, 730.)

EXCEPTIONS TO *MIRANDA*'S EXCLUSIONARY RULE

"*Miranda* requires that the unwarned admission must be suppressed." (*Oregon v. Elstad* (1985) 470 U.S. 298, 309.) However, the exclusionary rule of *Miranda* is more limited than the exclusionary rule for involuntary confessions.

A. PHYSICAL EVIDENCE WHICH IS FRUIT OF *MIRANDA* VIOLATION IS NOT EXCLUDED

The *Miranda* rule does not require suppression of physical items or other evidence obtained as a result of voluntary statements made without *Miranda* warnings. (See *United States v. Patane* (2004) 542 U.S. 630 [a gun discovered due to statement obtained in violation of *Miranda* was not subject to exclusion]; *Michigan v. Tucker* (1974) 417 U.S. 433, 446 [no right to have testimony of witness suppressed where witness's identity discovered from defendant's statement given without *Miranda* warnings]; *People v. Brewer* (200) 81 Cal.App.4th 442 [evidence obtained with warrant supported by statements given in violation of *Miranda* not excluded]; *People v. Whitfield* (1996) 46 Cal.App.4th 947 [officer asks handcuffed defendant if he has any drugs; cocaine turned over by defendant in response is admissible].)

The reason for this exception is that *Miranda* warnings are not themselves constitutionally protected. Nowhere does the Constitution say you have to advise a defendant of his right to remain silent and his right to counsel. *Miranda* warnings are prophylactic

measures to insure that the right against compulsory self-incrimination is protected. (*Oregon v. Elstad* (1985) 470 U.S. 298, 305.)

B. EXIGENT CIRCUMSTANCES

RESCUE DOCTRINE. Police can interrogate a person in custody without *Miranda* warnings if their intent is to rescue a victim, not to obtain an incriminating statement. (*People v. Panah* (2005) 35 Cal.4th 395, 470; *People v. Dean* (1974) 39 Cal.App.3d 875

PUBLIC SAFETY EXCEPTION. *New York v. Quarles* (1984) 467 U.S. 649. Defendant was arrested for rape. The criminal was armed, but defendant had no gun. Police could ask, "where's the gun," without giving *Miranda* warnings. Defendant's statements in response admissible.

C. BOOKING EXCEPTION

In *Pennsylvania v. Muniz* (1990) 496 U.S. 582 the Supreme Court held that routine booking questions (height, weight, eye color, DOB) are not subject to exclusion under *Miranda*, even when person arrested of DUI had difficulty answering them. However, court held asking defendant what year he celebrated his sixth birthday was interrogation and subject to exclusion under *Miranda*.

D. NONTESTIMONIAL EVIDENCE IS ADMISSIBLE

"The physical inability to articulate words in a clear manner . . . is not itself a testimonial component of [defendant's] responses." (*Pennsylvania v. Muniz* (1990) 496 U.S. 582.) Since it was not testimonial, prosecutor could also introduce evidence of his performance on the physical sobriety tests. His inability to perform those tests was not protected by the Fifth Amendment right against self-incrimination.

In contrast, silence in the face of questions or an accusation is testimonial, and such evidence cannot be admitted. (*Doyle v. Ohio* (1976) 426 U.S. 610.)

E. REQUESTS FOR CONSENT TO SEARCH NOT COVERED BY

MIRANDA

People v. Thomas (1970) 12 Cal.App.3d 1102, 1111.

F. STATEMENTS OBTAINED IN VIOLATION OF *MIRANDA* CAN BE USED TO IMPEACH A DEFENDANT IF HE TESTIFIES

"If no true coercion or compulsion is involved, both the [Supreme Court] and the courts of [California] have held that, even when an accused's statements in a particular context are inadmissible to prove he committed a crime, they are available to impeach him if he voluntarily testifies at the trial on criminal charges or allegations." (*People v. Pokovich* (2006) 39 Cal.4th 1240, 1257; see *Oregon v. Hass* (1975) 420 U.S. 714, 720-724; *Harris v. New York* (1971) 401 U.S. 222, 224-226.)

MIRANDA ONLY APPLIES WHEN A DEFENDANT IS IN CUSTODY

The *Miranda* rights only apply to custodial interrogations. Interrogation is custodial when "a person has been taken into custody or otherwise deprived of his freedom of action in any significant way." (*Miranda v. Arizona* (1966) 384 U.S. 436, 444.) The test is objective. The subjective views of the police and the suspect are not relevant. (*Stansbury v. California* (1994) 511 U.S. 318.) "[T]he ultimate inquiry is simply whether there is a 'formal arrest or restraint on freedom of movement' of the degree associated with a forma arrest." (*California v. Beheler* (1983) 463 U.S. 1121.) Where no formal arrest has taken place, the pertinent question is "how a reasonable man in the suspect's position would have understood his situation." (*Berkemer v. McCarty* (1984) 468 U.S. 420, 442.)

If a defendant is already incarcerated for another offense, *Miranda* warnings must be given if the prisoner's freedom of movement is further restricted in some way during questioning. Consider whether authorities took steps placing "further limitations on the prisoner." (*Cervantes v. Walker* (1978) 589 F.2d 424, 428.) In *People v. Macklem* (2007) 149 Cal.App.4th 674 the court found no custodial interrogation where a detective questioned a prisoner already in custody. The detective told the prisoner he did not have to talk, and that

if he wanted to stop the interview at any time the detective would leave the room and ask prison authorities to take Macklem back to his cell.

Custodial interrogation most frequently occurs when a person is formally arrested and questioned at the police station. A close examination of all the circumstances is necessary if a person responds to an "invitation" from police to come to the police station for questioning. This is when the question most frequently arises whether a person is "in custody" and therefore must be given *Miranda* warnings.

In *Oregon v. Mathiason* (1977) 429 U.S. 492 a police officer asked a parolee to come to the police station to talk about a burglary. The officer told him he was not under arrest, and was allowed to leave even after he confessed to the burglary. The Supreme Court held he was not in custody.

However, where a parolee was told his parole would be revoked if he did not meet with police at station, a court found custodial interrogation. (*United States v. Ollie* (8th Cir. 2006) 442 F.3d 1135.)

Custody found where a defendant was awakened at home, taken to police station in locked back seat of police car, told he was a suspect, and had no way of getting home unless police took him, even though he was told he was free to leave. (*United States v. Hanson* (8th Cir. 2001) 237 F.3d 961.)

Custody found where defendant went to police station for questioning and told he was not under arrest. However, he also told police would not take him home until he told the truth, and he was repeatedly accused of lying. When the defendant provided an alibi, he was told he had to say until police talked to his alibi witness. Court held a person under those circumstances would have been effectively under arrest. (*People v. Aguilera* (1996) 51 Cal.App.4th 1151.)

No custody where minor was told he did not have to speak with officer, was briefly handcuffed and placed in patrol car while officer conducted another part of investigation, then released from handcuffs and removed from car before being questioned. (*In re Joseph R.* (1998) 65 Cal.App.4th 954, 956-961.)

If the interrogation takes place in a familiar setting, such as the suspect's home, coercive measures which significantly restrict a person's freedom of movement will have to be present to show the suspect was "in custody" for *Miranda* purposes.

Beckwith v. United States (1976) 425 U.S. 341. IRS agents met with defendant at his home to audit his tax return. Even though he was the focus of a criminal investigation, he was not in custody because his freedom of movement was not restricted in any significant way.

Orozco v. Texas (1969) 394 U.S. 324. Defendant was in custody when four police officers questioned him in his own bed after entering his room and awakening him at 4 a.m..

Sprosty v. Buchler (7th Cir. 1996) 79 F.3d 635. Suspect in custody where defendant arrived home while police were executing a search warrant. Police surrounded his car, blocked the driveway and escorted him into the house. One officer stood guard during a three-hour search of the home.

United States v. Madoch (7th Cir. 1998) 149 F.3d 596. Defendant in custody when held in kitchen for five hours while residential search conducted.

A finding of custodial interrogation in other settings will depend on the presence of coercive factors, including physical restraints such as handcuffing, drawing of a gun or physically grabbing the suspect.

People v. Pilster (2006) 138 Cal.App.4th 1395, 1405. Police immediately handcuffed the defendant when they responded to a call about a bar fight. "[A] reasonable person would conclude defendant had been placed in custody when officers handcuffed him immediately after arriving on the scene."

In re Joseph R. (1998) 65 Cal.App.4th 954, 956-961 However, no custody where minor was told he did not have to speak with officer, was briefly handcuffed and placed in patrol car while officer conducted another part of investigation, then released from handcuffs and removed from car before being questioned.

Jacobs v. Singletary (11th Cir. 1992) 952 F.2d 1282. Defendant tried to run

a police roadblock and was fired upon. When she got out of the car, several police officers confronted her with weapons drawn. One of them, armed with a shotgun, grabbed her arm. She was in custody for *Miranda* purposes.

People v. Clair (1992) 2 Cal.4th 629, 679-680. However, no "custody" where an officer, with his gun drawn, approached the defendant at an apartment crime scene to ask who he was, whether he had identification and lived in the apartment, what he was doing in the apartment, and whether he knew the residents.

United States v. Teemer (1st Cir. 2005) 394 F.3d 59. A passenger in a car detained for 30 minutes is not "in custody," and no *Miranda* warnings are required before asking questions. Similarly, being detained at a border checkpoint does not qualify as "custody" for *Miranda* purposes. (*United States v. Hudson* (10th Cir. 2000) 210 F.3d 1184.)

MIRANDA WARNINGS ONLY REQUIRED WHEN THERE IS INTERROGATION

Rhode Island v. Innis (1980) 446 U.S. 291. Interrogation under *Miranda* "refers not only to express questioning, but also to any words or actions on the part of the police (other than those normally attendant to arrest and custody) that the police should know are reasonably likely to elicit an incriminating response from the suspect." (*Id.* at pp. 300-301.) In *Innis*, interrogation took place when police, with the arrested in the police car, began saying they hoped to find a shotgun, which witnesses had said the suspect was carrying, before kids at a nearby handicapped school found it.

If the defendant asks a question, the police respond, and the defendant decides to confess, no interrogation has taken place. (*People v. Clark* (1993) 5 Cal.4th 950, 985.) While being transported to police station after being arrested for murder, Clark asked, "What can someone get for something like this, thirty years?" A police officer replied, "Probably not unless you were a mass murderer." A few minutes later defendant confessed. There was no interrogation since the officer had no reason to know his casual comment would produce an incriminating statement.

Volunteered statements are admissible, since they are not the product of interrogation. "Statements volunteered when not in response to an interrogation are admissible against a defendant, even after an initial assertion of the right to remain silent." (*People v. Daniels* (1976) 16 Cal.3d 156, 172.) In *Daniels*, a police officer was conducting a test for nitrates. Defendant volunteered innocent reasons why there may be nitrates on his hands and then said he was familiar with explosives and that explosives might be found in his car.

There is no interrogation when police provide the opportunity for a suspect to talk with a third party. Thus, when police allowed the defendant to talk with his father, and he made incriminating statements, there was no *Miranda* violation because defendant's statements were not the produce of interrogation. (*People v. Mayfield* (1997) 14 Cal.4th 668, 758.) The common police practice of putting defendants together and taping their conversation is not a *Miranda* violation.

ADEQUACY OF ADVISEMENTS

In *Miranda v. Arizona*, *supra*, 384 U.S. 436, the court stated the enumerated warnings had to be given "*in the absence of a fully effective equivalent.*" (*Id*. at p. 476, italics added.) In *California v. Prysock* (1981) 453 U.S. 355, the Supreme Court held if the rights enumerated in *Miranda* are effectively communicated, the exact words used by the police are not important. No "talismanic incantation" is required to satisfy *Miranda.* (*Id.* at p. 359.)

In *Duckworth v. Eagan* (1989) 492 U.S. 195 the defendant was told, "We have no way of giving you a lawyer, but one will be appointed for you, if you wish, if and when you go to court." (*Id*. at p. 198.) The Supreme Court held that because of other warnings given, this did not invalidate his ultimate confession. Significantly, defendant was advised a second time before he confessed, and second advisement made it clear he was entitled to appointed counsel, if requested, before and during questioning.

People v. Wash (1993) 6 Cal.4th 215, 236. Where defendant was told he would be provided appointed counsel, if he wished, "before" questioning, it was sufficient,

even though not told he had right to attorney "during" questioning.

People v. Lujan (2001) 92 Cal.App.4th 1389. Defendant told, "Your rights are you have the right to remain silent. [¶] Whatever we talk about, and you say, can be used in a court of law, against you. [¶] And if you don't have money to hire an attorney, one's appointed to represent you free of charge." (*Id*. at p. 1397.) When defendant asked for an attorney during questioning, the police replied that was fine, but it would not be possible to find one on a Sunday night, and one would be appointed when he went to court in a couple days. Defendant kept talking and confessed to a murder. A *Miranda* violation was found because defendant was never told he had the right to consult with an attorney before and during questioning.

People v. Diaz (1983) 140 Cal.App.3d 813. Defendant told, in Spanish, "[i]f you cannot get a lawyer, one can be named before they ask you questions." (*Id*. at p. 822.) This was insufficient to advise defendant of an indigent's right to appointed counsel.

TIMING OF ADVISEMENTS

Police cannot asks questions until they get a confession, and only then give *Miranda* rights. A second confession given after *Miranda* advisements and waiver is not admissible when police employ this "question first, advise later," tactic. In *Missouri v. Seibert* (2004) 542 U.S. 600 the court strongly condemned the "question first" tactic, an intentional effort to bypass *Miranda* strictures.

If police give *Miranda* advisements, obtain a valid waiver, and return at some later point to again question the defendant, a new advisement is not necessary, particularly if the police remind defendant of advisements previously given.

United States v. Rodriguez-Preciado (9th Cir. 2005) 339 F.3d 1118. No readvisement needed when questioned 16 hours later.

United States v. Pruden (3d Cir. 2005) 398 F.3d 241. No readvisement needed

when questioned 20 hours later.

Maguire v. United States (9th Cir. 1968) 396 F.2 327. No readvisement needed when questioned 3 days later.

WAIVER OF RIGHTS

A waiver of *Miranda* rights, like the waiver of any constitutional right, must be knowing and intelligent, and the government has a "heavy burden" to establish a valid waiver. **(***Miranda v. Arizona* (1966) 384 U.S. 436, 475.)

The waiver may be implied by the defendant's conduct. An express oral or written waiver is not necessary. (*North Carolina v. Butler* (1979) 441 U.S. 369.) "The courts must presume that a defendant did not waive his rights; the prosecution's burden is great; but in at least some cases waiver can be clearly inferred from the actions and words of the person interrogated." (*Id*. at p. 373.)

When a police officer could not recall asking the defendant is he understood his rights and could not say whether the defendant was literate or otherwise capable of understanding his rights, the Supreme Court found the State had failed to meet its heavy burden of establishing a valid waiver. (*Tague v. Louisiana* (1980) 444 U.S. 469.)

In determining whether the prosecution has met its heavy burden of establishing a valid waiver, the court must consider "'the particular facts and circumstances surrounding that case, including the background, experience, and conduct of the accused.'" (*Id*. at pp. 374-375.) Thus, the court must consider the individual's defendant's ability to understand the warnings and what he or she is giving up. Factors such as age, IQ and language proficiency should be considered.

For example, in determining whether a juvenile's waiver of his *Miranda* rights is voluntary courts should consider the juvenile's "age, experience, education, background, and intelligence, and ... whether he has the capacity to understand the warnings given him, the nature of his Fifth Amendment rights, and the consequences of waiving those rights.

[Citation.]" (*Fare v. Michael C.* (1979) 442 U.S. 707, 728.) A request to speak with a parent is an important factor. It may be argued, based on *People v. Burton* (1971) 6 Cal.3d 375, 383-384 that a "minor's request to speak to parent must be taken as invocation of Miranda rights 'in the absence of evidence demanding a contrary conclusion.'" (*People v. Hector* (2000) 83 Cal.App.4th 228, 237.)

Another factor important to the validity of a waiver of *Miranda* rights is police coercion. "[A]ny evidence that the accused was threatened, tricked, or cajoled into a waiver will, of course, show that the defendant did not voluntarily waive his privilege." (*Miranda v. Arizona* (1966) 384 U.S. 436, 476.) Factors relevant to voluntariness will apply here as well. For example, in *United States v. Hernandez* (5th Cir. 1978) 574 F.2d 1362 the court found a waiver of *Miranda* rights was invalid where the defendant was held in custody for an extended period before being given *Miranda* warnings.

EQUIVOCAL OR AMBIGUOUS INVOCATION OF *MIRANDA* RIGHTS

All questioning must stop if an in-custody defendant invokes his *Miranda* rights. (*Miranda v. Arizona* (1966) 384 U.S. 436, 473-474.) Questions frequently arise whether a defendant has invoked his rights. The rule that interrogation must cease because the suspect requested counsel or asserted his right to remain silent does not apply if the request is equivocal. The request for counsel, or to stop answering questions, must be unambiguous.(*Davis v. United States* (1994) 512 U.S. 452, 459.) In *Davis*, a defendant said, "maybe I should talk to a lawyer." When asked what he meant, he said he did not want a lawyer. He was readvised of his rights, and continued to answer questions. The Supreme Court held this was not an unambiguous invocation of his right to counsel. (*Id*. at p. 459-460.)

The requirement of an unequivocal invocation of Fifth Amendment rights is important because if the request is equivocal, the police are allowed to ask clarifying questions. (*People v. Wash* (1993) 6 Cal.4th 215, 238.) Clarifying questions usually result in continued

interrogation and further incriminating statements.

People v. Michaels (2002) 28 Cal.4th 486, 509. Saying "'I don't know if I should without an attorney," was not an unambiguous invocation of right to counsel.

People v. Stitely (2005) 35 Cal.4th 514 "I think it's about time for me to stop talking" was not unambiguous invocation of right to silence.

People v. Gonzalez (2005) 34 Cal.4th 1111, 1125. "I don't have no public defender" was not unambiguous invocation of right to counsel

People v. Wash (1993) 6 Cal.4th 215, 238. "I don't know if I wanna talk anymore" was not unambiguous invocation of right to silence.

People v. Peracchi (2001) 86 Cal.App.4th 353, 360-361. Police gave *Miranda* advisements and asked defendant if, having those rights in mind, defendant wanted to talk. He said, "I don't think so. At this point, I don't think I can talk." This was an unambiguous assertion of right to remain silent. Officer who asked why he didn't want to talk was not seeking clarification whether he was asserting his right to silence.

Anderson v. Terhune (9th Cir. 2008) 516 F.3d 781. "I plead the Fifth" was not ambiguous.

Anderson v. Smith (2d Cir. 1984) 751 F.2d 96, 105. When asked, "do you want to talk to me now?" Defendant replied, "No." This was unambiguous assertion of right to silence, and officer should have ceased interrogation. Instead, he said, "You don't want to talk to me? Why?" Questioning continued and defendant incriminated himself.

So, when a defendant unambiguously invokes his rights, his *reasons* for doing so are immaterial. (*People v. Marshall* (1974) 41 Cal.App.3d 129, 135.) If police ask "why" a defendant is invoking his rights, you have a good argument this is not proper clarifying questioning about an ambiguous invocation of rights.

NB: Prior to *Davis*, many California cases had "indicated that a request for counsel need not be unequivocal in order to preclude questioning by the police." (*People v.*

Crittenden (1994) 9 Cal.4th 83, 129.) Older cases are questionable authority on this issue, and should only be used if they can be reconciled with *Davis*.

QUESTIONING AFTER A DEFENDANT INVOKES HIS *MIRANDA* RIGHTS

The general rule is that once a defendant has invoked his right to counsel, he or she "is not subject to further interrogation by the authorities until counsel has been made available to him, unless the accused himself initiates further communication, exchanges, or conversations with the police." (*Edwards v. Arizona* (1981) 451 U.S. 477, 484-485.) There are exceptions to this general rule, however.

A. DEFENDANT INITIATES FURTHER CONVERSATION

As *Edwards* expressly says, there is no *Miranda* violation if a defendant, after initially invoking his rights, later initiates further conversation with the police. In *Oregon* v. *Bradshaw* (1990) 462 U.S. 1039 the defendant said he wanted a lawyer. Police stopped the interrogation. Bradshaw later asked an officer, "Well, what is going to happen to me now?" A conversation followed, and defendant agreed to take a polygraph test. He was again advised of his *Miranda* rights and ultimately confessed. A plurality of four justices held his question showed the defendant initiated further communication, and there was therefore no *Miranda* violation. (*Id*. at pp. 1045-1046.)

California examples applying *Bradshaw* include *People v. Thompson* (1990) 50 Cal.3d 134. When defendant asserted his *Miranda* rights, questioning ceased. Defendant later talked with attorneys from the Public Defender's Office. He later asked police about getting his girlfriend released from jail. They explained further conversation was prohibited unless he requested it. He replied he wanted to talk about "certain things." The police re-advised him of his *Miranda* rights, obtained a waiver, and began talking about the girlfriend. Conversation eventually turned to the crime, and defendant confessed. The court held there was no *Miranda* violation because defendant initiated further conversation an d waived his

rights. (*Id*. at p. 164.)

In contrast, in *People v. Boyer* (1989) 48 Cal.3d 247, the court found a *Miranda* violation where the police, rather than the defendant, initiated further contact. Police ignored defendant's repeated assertions of his rights and questioned him for two hours. Police then told defendant they could no longer question him because he had not waived his rights. However, an officer continued with a monologue about all the evidence against defendant, and he blurted out an incriminating statement. Since there was no initiation of a new conversation by the defendant, the police violated *Miranda.* (*Id*. at p. 274-175.)

B. EFFECT OF A BREAK IN CUSTODY

"*Edwards* is not violated when the police recontact a suspect after a break in custody *which gives the suspect reasonable time and opportunity, while free from coercive custodial pressures, to consult counsel if he or she wishes to do so*." (*People v. Storm* (2002) 28 Cal.4th 1007, 1024-1025, italics in original.) In *Storm*, a polygraph examiner continued to question defendant after he asserted his right to counsel Defendant admitted he assisted his wife commit suicide. The police did not arrest him. Two days later the police went to his home, assured him he would not be arrested, and questioned him again without *Miranda* warnings. The police left, as promised, without arresting him. His later statement was admissible at his murder trial. The court held, "We are persuaded . . . that the two-day ... hiatus. . . was amply sufficient to dissipate custodial pressures and permit defendant to consult counsel." (*Id*. at p. 1025.)

C. POLICE RENEWED QUESTIONING AT A LATER TIME

Since there is no "fruit of the poisonous tree" doctrine in the *Miranda* context, police can return later to question a defendant who invoked his right to silence, advise him again of his rights, and obtain a statement which will be admissible at trial. (*Michigan v. Mosley* (1975) 423 U.S. 96.) In *Mosley*, defendant asserted his right to silence when questioned

about a string of burglaries. Later the same day another police officer brought defendant to his office, advised him again of his *Miranda* rights, and questioned him about an unrelated homicide. Defendant waived his rights and gave a statement which the Court held was admissible. The court reasoned *Miranda* does not "create a *per se* proscription of indefinite duration upon any further questioning by any police officer on any subject, once the person in custody has indicated a desire to remain silent." (*Id*. at pp. 102-103.) Instead, "the admissibility of statements obtained after the person in custody has decided to remain silent depends under *Miranda* on whether his 'right to cut of questioning' was 'scrupulously honored.'" (*Id*. at p. 104.)

The Court in *Moseley* found the "scrupulously honored" test was met because the police immediately honored his invocation of his right to remain silent, resumed questioning after a significant amount of time had passed, again advised defendant of his *Miranda* rights, and only questioned him about a separate crime. (*Id*. at p. 106.) Not all these factors must be present, however, to find a subsequent confession is admissible.

Charles v. Smith (5th Cir. 1990) 894 F.2d 718. Where same officer questioned defendant about same crime just a few minutes after defendant invoked his right to silence, *Miranda* as interpreted by *Mosley* was violated.

United States v. Barone (1st Cir. 1992) 968 F.2d 1378. Police did not "scrupulously honor" defendant's invocation of *Miranda* rights where they renewed contact four times, urged him to give a statement, and twice told him his life would be in danger if he did not cooperate.

Jacobs v. Singletary (11th Cir. 1992) 952 F.2d 1282. Police did not "scrupulously honor" defendant's invocation of *Miranda* rights where they made 6 attempts at reinitiating questioning within 2 hours.

Kelly v. Lynaugh (5th Cir. 1988) 862 F.2d 1126. No *Miranda* violation where 7 to 12 hours after invocation of right to silence police, while conducting a gunshot residue case, told Kelly a co-defendant had given a statement implicating Kelly. Kelly said he would talk if shown the co-defendant's signed statement. After seeing it, he

confessed.

A more stringent rule should apply if a defendant invokes his right to counsel rather than his right to remain silent. in *People v. DeLeon* (1994) 22 Cal.App.4th 1265 the court noted the scope of *Miranda* differs depending on whether a defendant invokes a right to silence or a right to an attorney present during questioning. Invocation of the right to silence is offense-specific and does not prohibit later questioning about a different crime, or even about the same crime. If a person invokes the right to have an attorney present, questioning is improper *under any circumstance* until counsel is present. (*Id*. at pp. 1269-1270.)